

1 IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE
2 At Chattanooga

3 UNITED STATES OF AMERICA
4 *Plaintiff,*
5 v.
6 MARK DEAKINS,
7 *Defendant.*
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9 } CAUSE NO. 1:21-Cr-0058-CEA-SKL
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11 } MOTION TO SEVER COUNTS
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17 **MOTION TO SEVER COUNTS**

18 COMES NOW the Defendant, Mark Deakins, by and through his attorney, and respectfully
19 moves this court to sever Counts One and Two from Counts Three through Five in the Second
20 Superseding Indictment. (Doc. No. 43). In evaluating Defendant's motion, the court first considers
21 whether the offenses were properly joined under the standards established in Federal Rule of Criminal
22 Procedure 8(a). However, even if joinder of the offenses is proper pursuant to Rule 8(a), the Court has
23 the discretion to order severance under Federal Rule of Criminal Procedure 14(a) if the Court finds
24 that Mr. Deakins would suffer "undue prejudice" from keeping the counts joined in a single trial.

25 **JOINDER**

26 Rule 8(a) provides three potential bases for which multiple offenses can be properly joined in a
27 single indictment: (1) the offenses are of same or similar character; (2) the offenses are based on the
28 same act or transaction; or (3) the offenses are connected with or constitute parts of a common scheme
29 or plan. Rule 8(a) "should be construed in favor of joinder, it is also true that failure to meet the
requirements of this rule constitutes misjoinder as a matter of law." *United States v. Hatcher*, 680 F.2d
423, 440 (6th Cir. 1982). Moreover, an indictment that does not comply with the rules of 8(a), requires
the remedy of severance of counts. *Id.* at 441. Furthermore, whether joinder was proper, the Court

1 must look to the allegations in the indictment. *United States v. Frost*, 125 F.3d 346, 389 (6th Cir.
2 1997). Lastly, the heart of Rule 8(a) is judicial economy, which is to “promote the goals of trial
3 convenience and judicial efficiency.” *United States v. Wirsing*, 719 F.2d 859, 862 (6th Cir. 1983).

4 Furthermore, the Sixth Circuit has emphasized prongs two and three when the offenses are
5 tangentially of a similar character. For example, in *U.S. v. Chavis*, the Court found misjoinder of a gun
6 and drug charge, because the gun charge occurred in September of 1997 and the possession of cocaine
7 base in June 1999. *U.S. v. Chavis* 296 F.3d, 450, 458 (2002). It was clear the two offenses were not
8 connected by a common scheme or plan and the offenses certainly weren’t based on the same act or
9 transaction. *Id.* Also, the court noted that the face of the indictment did not allege a common thread
10 between the two offenses. *Id.* Further, the court noted the minimal judicial efficiency, which is the
11 “predominant consideration” of Rule 8(a), to having these charges joined in a trial, because the
12 offenses arose out of separate and unrelated transactions. *Id.* at 460.

15 The Indictment in this case alleges violations of Federal law that occurred during three
16 different periods of time. Count One alleges a violation of 18 U.S.C § 2421 by knowing transporting a
17 minor to Florida occurring in or about November 1998 and continuing until in or about June 2000.
18 Count Two charges a violation of 18 U.S.C § 2251(a) starting in or about 2006 and continuing until in
19 or about 2007. Finally, Counts Three, Four and Five all alleges violations of Federal law occurring in
20 2018. The offenses in the Second Superseding Indictment allege violations of Federal law separated
21 by as much as two decades, and as such, the offenses are not based on the same act or transaction.

24 Moreover, there isn’t a nexus of the offenses that constitute parts of a common scheme or plan,
25 as the offenses allegedly occurred over a twenty-year period. However, the offenses can potentially be
26 characterized as having a similar character. On the other hand, a single trial of three alleged victims
27 covering three distinct time periods is not more efficient than having three separate trials. As a result,
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1 the spirit of Rule 8(a) isn't being furthered by joinder in Mr. Deakins's case. Also, the only evidentiary
2 overlap based on the face of the Indictment in the counts are in Counts Three through Five. Lastly,
3 two of the three prongs of Rule 8(a) fail miserably, and the similar character prong—given there's
4 Five Counts and allegations Mr. Deakins violated three distinct federal laws—isn't enough to satisfy
5 the requirements of Rule 8(a) of the Federal Rule of Criminal Procedure.
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7 SEVERANCE

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9 Even when joinder is proper under Rule 8(a), severance may still be appropriate. Rule 14(a)
10 provides a trial court discretion to sever a prejudicial joinder. *U.S. v. Critton*, 43F.3d 1089, 1098 (6th
11 Cir. 1995). In evaluating a severance motion, a trial court balances any possible prejudice to the
12 defendant against the interest of efficiency. *United States v. Perkins*, 926 F.2d 1271, 1280 (1st Cir.
13 1991). In determining whether a defendant will be unduly prejudiced, a court considers several factors,
14 including 1) the factual overlap between counts, (2) the extend to which evidence of guilt is
15 overwhelming for each charge; (3) the inflammatory nature of each charge; and (4) the likelihood of
16 jury confusion.
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19 As a preliminary matter, the expected evidence presented at trial includes testimony from the
20 alleged victims as well as pictures and videos. As a result, each alleged victim is expected to take the
21 stand and be subjected to cross-examination and confronted with any impeachment evidence. There is
22 no factual overlap between Counts One, Two and Three, although there is between Counts Three
23 through Five. The second prong must fail, because evidence of Counts One, Two and Three are
24 unlikely to be independently admissible under Rule 404(b) of the Federal Rules of Evidence. In fact,
25 the joinder of Counts One, Two and Three curtails the Court's ability to rule on the admissibility of
26 evidence under 404(b).
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1 Moreover, the primary concern with joinder in this case is the jury determining guilt based on
2 improper character evidence. For example, should these counts remain joined, there is a high
3 probability a jury would determine guilt based solely on the cumulative allegations, or conclude guilt
4 on all counts based on the evidence presented related to one charge. This risk is so severe that an
5 admonitory instruction would not cure the prejudice. As such, the only cure is to sever the counts.
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7 Furthermore, the quintessential balancing test between judicial economy and prejudice to Mr.
8 Deakins also weighs heavily in favor of severing the counts. As previously noted, all three alleged
9 victims are expected to give testimony regarding allegations that are in no way connected to one
10 another. In essence, keeping the counts joined would create three mini-trials, which is in no way
11 efficient. On the other hand, should the counts remain joined, the potential prejudice to Mr. Deakins is
12 evident. For example, it is expected witnesses in Count One and Count Two will have potential
13 impeachment evidence, but the jury could find the evidence in Count Three so overwhelming that it
14 ignores evidence in Count One and Count Two, including the credibility of witnesses associated with
15 those Counts.
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18 **CONCLUSION**

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20 Mr. Deakins submits that under Rule 8(a), the Second Superseding Indictment improperly joins
21 Count One and Count Two with Counts Three through Five. Moreover, under Rule 14(a), Count One
22 and Two should be severed from Counts Three through Five, because severance of the counts is just as
23 economical as keeping the counts joined in a single trial, and the prejudice to Mr. Deakins in keeping
24 the counts joined is immense due to the inflammatory nature of each charge, as well as the likelihood
25 evidence would not be independently admissible under Rule 404(b). As a result, Count One and Count
26 Two should be severed from Counts Three through Five.
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Respectfully submitted,

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